DATE: January 31, 2007

In re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 05-02396

DECISION OF ADMINISTRATIVE JUDGE

ELIZABETH M. MATCHINSKI

APPEARANCES

FOR GOVERNMENT

John B. Glendon, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant was convicted of driving while intoxicated (DWI) offenses committed in December 1994, July 1996, and July 2002. The last DWI occurred after he received counseling and attended Alcoholics Anonymous (AA) for more than one year. The alcohol consumption and criminal conduct concerns are not mitigated where he shows little insight into his drinking and driving behavior. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. As required by Department of Defense Directive 5220.6 ¶ E3.1.2 (Jan. 2, 1992), as amended, DOHA issued a Statement of Reasons (SOR) on October 26, 2005, detailing the basis for its decision-security concerns raised under Guideline G (alcohol consumption) and Guideline J (criminal conduct) of the Adjudicative Guidelines. Applicant answered the SOR on November 22, 2005, and elected a decision based on the written record. His initial answer was incomplete in that he failed to respond to SOR ¶ 1.d and ¶ 1.e. He filed a second answer on March 31, 2006, requesting a hearing before an administrative judge, and the case was assigned to me on ay 18, 2006.

Pursuant to notice of June 30, 2006, I convened a hearing on August 1, 2006, to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Four government exhibits (Ex. 1-4) and two Applicant exhibits (Ex. A-B) were admitted and testimony was taken from Applicant, as reflected in a transcript (Tr.) received on August 10, 2006.

FINDINGS OF FACT

DOHA alleged under Guideline G, alcohol consumption, that Applicant consumed alcohol at times to excess and intoxication from about 1994 to at least January 2004 (¶ 1.a); pleaded guilty to a December 1994 DWI (¶ 1.b); was arrested for DWI second offense in July 1996 but pleaded to an amended charge of DWI and was sentenced in part to an alcohol education program (¶ 1.c); was assessed for alcohol abuse in 1996 where it was recommended he abstain from

alcohol and obtain counseling, and he attended Alcoholics Anonymous (AA) for one year (¶ 1.d); and he was convicted of a July 2002 DWI second offense (¶ 1.e). The DWI offenses were cross-alleged under Guideline J, criminal conduct. In his answer of March 31, 2006, Applicant admitted the allegations.

Applicant's admissions are incorporated as findings of fact. After consideration of the pleadings, exhibits, and hearing transcript, I make the following additional findings.

Applicant is a 49-year-old senior field service engineer who has held his job since April 1987, staying on through corporate mergers and acquisitions. He has held a security clearance up to the level of top secret throughout most of his employ.

Applicant got married in 1989. He and his spouse had no children of their own. Applicant enjoyed going out and having a few alcohol drinks. He also played billiards, at times weekly, and customarily consumed alcohol when he played.

Celebrating New Year's on his own, Applicant consumed at least three or four bourbon and coke drinks between 9:00 p.m. and midnight at a pub restaurant. He was pulled over en route home for failure to stay within marked lanes, and was arrested for DWI after failing field sobriety tests. Applicant, who represented himself in court, pleaded guilty and was sentenced to a $350 fine plus $70 penalty assessment, an alcohol education program, and 90 days license suspension. Applicant attended alcohol awareness sessions once weekly for five to six weeks, where he was told to exercise care with respect to the amount of alcohol consumed if he was planning to operate a vehicle. He was not referred for alcohol treatment. Applicant testified, unrebutted by the government, that he told his employer about his arrest.

On July 11, 1996, after he had consumed three or four bourbon and coke drinks at a bar, Applicant executed a last minute maneuver in an unfamiliar area when he realized he was about to turn onto a one-way street. He was stopped by an officer who was following, and administered field sobriety tests that he failed. Applicant was charged with DWI, second offense, as his blood alcohol content was at or above the legal limit (.08%). Legal counsel negotiated an amended charge of DWI on his behalf. Applicant pleaded guilty to the amended charge, and was sentenced to a $500 fine plus a $100 penalty assessment, an alcohol education program, and 90 days loss of license.

Applicant participated in a group education program from June 20, 1996, to June 26, 1996, where he was required to stay at the facility. He reported drinking up to daily at some point in the past, but that he had moderated his drinking by 1996. It was recommended to him that he abstain from alcohol and follow-up with individual counseling and Alcoholics Anonymous (AA). Applicant went to two or three counseling sessions with a local clinician. He also became active in AA, attending two or three meetings weekly for more than one year, obtaining a sponsor, maintaining abstinence, and beginning step work. He ceased his affiliation with AA as he felt he did not need it, since his drinking history was not as abusive as others' in the program.

Applicant resumed drinking once he was no longer involved in AA, although he cannot now recall the date. It started with one drink while on temporary duty for his employer. At his hearing, he described the frequency of his consumption as "every couple of months or something of that nature." (Tr. 80)

In November 2001 Applicant and his spouse divorced. On July 14, 2002, Applicant drank three or four bourbon and cokes over a couple of hours at the establishment where he played billiards. En route home in the early hours of the morning, Applicant was stopped for crossing the center line. A police officer, traveling in the opposite direction, complained Applicant had almost struck him. Applicant failed field sobriety tests and was arrested for DWI, second offense, and failure to keep right.

On October 9, 2002, Applicant executed a security clearance application (SF 86). Applicant disclosed his July 14, 2002 DWI arrest in response to question 23, any pending charges. He listed his first DWI (mistakenly dated as December 1995) in response to question 24, concerning any alcohol/drug offenses, and his 1996 DWI in answer to question 26, other offenses in the last seven years.

Applicant was subsequently found guilty in district court of the July 2002 DWI, and sentenced to a $500 fine and three years' loss of license. For the failure to keep right, he was ordered to pay a $60 fine plus $12 penalty assessment.

Applicant appealed his DWI conviction to superior court as he felt the police officer had targeted the wrong person ("a case of mistaken identity").

While his appeal was pending, Applicant was interviewed by a Defense Security Service (DSS) special agent on January 26, 2004, about his drunk driving offenses. Applicant related he had consumed only one to two drinks of bourbon and coke before his July 1996 arrest, but admitted he had failed field sobriety tests and been convicted of DWI. Although he acknowledged also failing field sobriety tests when he was arrested in July 2002, he appealed that conviction as the officer had wrongly identified him as the person who had nearly hit him. Applicant denied to the agent that he had any problem with alcohol, and described his drinking as "usually weekly, having two to three drinks." Applicant denied any consumption to intoxication or ever feeling that he had to cut down on his drinking. Applicant expressed regret about the drunk driving incidents and his intent to not repeat those mistakes in the future.

Applicant's conviction was upheld on appeal in July 2004, and he was ordered to participate in the state's multiple offender program (MOP). After spending three days in jail, he was taken to the multiple DWI intervention center's program on July 9, 2004. He was discharged from the program on July 16, 2004, to participate in aftercare. From September 7, 2004, to April 7, 2005, Applicant attended seven sessions of counseling for diagnosed alcohol abuse with a licensed alcohol and drug counselor (LADC).[(1)] On April 7, 2005, the LADC certified to the state MOP that Applicant was at low risk to recidivate; that he appeared "open, insightful & motivated to avoid further drinking & driving." (Ex. 4)

Tired of the legal trouble he caused himself, Applicant made some lifestyle changes. He began working out and quit smoking. The place where he played billiards closed down two years ago. While he testified he tries to stay away from the "scenes" that caused him problems in the past (Tr. 36), he and his girlfriend in late spring 2006 went to the pub where he had consumed alcohol before his 1994 DWI. After dinner, they sat and played Keno. Applicant initially testified he drank two bourbon and coke mixed drinks (Tr. 74) or possibly three (Tr. 75). When later asked about the largest quantity of alcohol consumed on a single occasion within the past two years, Applicant responded he drank three or four bourbon and coke drinks, "close to intoxication," that night. (Tr. 84) His girlfriend drove them home as he faces legal sanctions if he is caught driving with a blood alcohol content of .03% or greater.

As of his hearing, Applicant had not consumed alcohol for about a month. His last drink was one beer at a restaurant in late June or early July 2006. He usually has one drink when he and his girlfriend go out to dinner. Applicant does not intend to operate a motor vehicle while intoxicated in the future. He intends to continue to drink socially as he enjoys it. Applicant understands that if he is caught drunk driving again, he will be jailed for an extended period. He does not consider it appropriate to jail someone who hasn't harmed anyone, but regrets his failure to follow the rules regarding drinking and driving.

A coworker of Applicant's for the past 15 years has found him to be a dedicated, trusted employee. She has made several business trips with Applicant in support of Navy contracts and has been impressed with Applicant's honesty and integrity. She reports Applicant is respected by their customer.

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960). An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).

The Adjudicative Guidelines set forth potentially disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not

necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

CONCLUSIONS

Guideline G--Alcohol Consumption

Excessive alcohol consumption often leads to the exercise of questionable judgment, unreliability, failure to control impulses, and increases the risk of unauthorized disclosure of classified information due to carelessness. ¶ E2.A7.1.1. Applicant's three drunk driving convictions raise serious Guideline G concerns. Disqualifying condition (DC) ¶ E2.A7.1.2.1. *Alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, or other criminal incidents related to alcohol use*, is clearly implicated. However, the government failed to prove its case for application of DC ¶ E2.A7.1.2.3. *Diagnosis by a credentialed medical professional (e.g., physician, clinical psychologist, or psychiatrist) of alcohol abuse of alcohol*, or DC ¶ E2.A7.1.2.4. *Evaluation of alcohol abuse or alcohol dependence by a licensed clinical social worker who is a staff member of a recognized treatment program*.[(2)] DC ¶ E2.A7.1.2.3 and ¶ E2.A7.1.2.4 are not triggered simply by a diagnosis of abuse. The qualifications of the clinician rendering the diagnosis, and in the case of ¶ E2.A7.1.2.4 also the clinician's professional employment, must be taken into account. The LADC who diagnosed Applicant with alcohol abuse in 2004 is recognized by the state's MOP program to provide aftercare counseling to repeat DWI offenders, but there is no evidence the LADC is a credentialed medical professional or LCSW. Nor can it be concluded from the scant evidence of record whether he is affiliated with a recognized treatment program.

In the absence of a qualifying diagnosis,[(3)] Applicant need not meet the requirements of ¶ E2.A7.1.3.4 to prove mitigation. While three drunk driving offenses within ten years are enough to demonstrate a pattern of abuse, mitigating condition (MC) ¶ E2.A7.1.3.2. *The problem occurred a number of years ago and there is no indication of a recent problem*, comes into play, as four years have passed since his last DWI. However, more is required to guarantee against recurrence where Applicant's second and third DWI offenses were separated by six years, and his 2002 offense occurred after he had attended alcohol education classes and more than a year of AA involvement.

Applicant contends he has made positive changes in behavior supportive of sobriety (¶ E2.A7.1.3.3). He stopped smoking, began working out, and endeavored to avoid the "scenes" that led him to drink to excess in the past. Yet, he also testified that in late spring 2006, he consumed "possibly three" bourbon and cokes "close to intoxication" while playing Keno at the same pub where he had consumed alcohol before his first DWI. His recent consumption in an amount similar to that of his DWIs (three or four bourbon and cokes) raises significant concern. Moreover, although Applicant showed good judgment in not driving home after drinking at the pub in 2006, his burden of reform is not met by evidence of denial and minimization of his drinking behaviors. Applicant told a DSS agent in January 2004 that despite failing field sobriety tests, he had consumed only one to two drinks of bourbon and coke before his arrest in July 1996. When asked at his hearing about when he last drank a bourbon and coke, Applicant responded he had two drinks three or four months ago at the pub where he had been stopped in 1994. He had gone out to dinner with his girlfriend. Asked then when he had last consumed as many as three or four bourbon and cokes, Applicant responded, "It's been awhile . . . I couldn't tell you, a year, maybe longer." (Tr. 73-74) Yet, when questioned about the largest quantity he consumed on a single occasion in the past two years, Applicant testified he had "three to four drinks" when he went to the pub and played Keno with his girlfriend. Confronted then with his earlier admission to having consumed only two drinks on that occasion, Applicant testified, "I might possibly have had three." (Tr. 75)

Guideline J--Criminal Conduct

A history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. ¶ E2.A10.1.1. Applicant's three DWI offenses fall within DC ¶ E2.A10.1.2.1. *Allegations or admission of criminal conduct, regardless of whether the person was formally charged*, and ¶ E2.A10.1.2.2. *A single serious crime or multiple lesser offenses,* of Guideline J.

Given the absence of any recurrence since 2002, Applicant's drunk driving is potentially mitigated under ¶

E2.A10.1.3.1. *The criminal behavior was not recent*. Applicant has shown some reform by complying with the laws proscribing drunk driving since his last arrest in July 2002. There is no evidence that Applicant even operated a motor vehicle while his license was suspended. Yet, despite his completion of the MOP program and aftercare counseling required by the court following his third conviction, I am unable to conclude that he is successfully rehabilitated (*see* ¶ E2.A10.1.3.6. *There is clear evidence of successful rehabilitation*). Reform depends on an acknowledgment of misconduct with appropriate expression of remorse and sincere commitment to not repeat the behavior. In response to the criminal conduct allegation, Applicant indicated on November 22, 2005 (Ex. A):

While I admit to drinking and driving I don't believe the act is criminal since at no time I have never done anything to harm another human or another person's property and I never would. The laws have become a legal avenue for in essence a "Witch Hunt" like those in the late 1600 where people were put to death because of perception.

Applicant now acknowledges he "crossed the line," and regrets his behavior (Tr. 35), but he continues to minimize his misconduct:

A person should be held responsible for doing--I don't know how to explain this, I don't feel I've done anything bad, I know there is a law there and I seem to walk the line and fail, have failed in the past. I think that the one of the things that will probably keep me from ever being in the situation again is the next time I am caught I will be placed in jail for an extended period of time. And I don't believe that's correct, I mean I have a problem with that, a person who has not done anything wrong can be placed in jail, who hasn't done any harm to anyone. I know that they have the rules for safety. I just think that they--. I just don't agree with the rules, although I have tried to follow them and failed. That I regret.

(Tr. 69) The government must be assured that those persons granted access can be relied on to comply with the rules and regulations regarding the handling and safeguarding of classified information, even when the person does not agree with the rules or finds them personally inconvenient. The threat of criminal sanctions may well deter Applicant from future drunk driving, but his failure to appreciate the seriousness of his criminal behavior is very troubling and undermines his claim of reform.

Whole Person Analysis

"The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance." ¶ E2.2.1. Drunk driving is punished criminally because of the very serious risk to public safety (¶ E2.2.1.1. *The nature, extent, and seriousness of the conduct*). His drunk driving as an adult (¶ E2.2.1.4. *The individual's age and maturity at the time of the conduct*) is all the more egregious because of its recidivism (¶ E2.2.1.3. *The frequency and recency of the conduct*), and the fact that he held a security clearance at the time. Applicant, who drank at least three bourbons and coke to admitted "close intoxication" on at least one occasion in 2006, has not shown that he understands the risk to classified information posed by the abuse of alcohol off-duty (¶ E2.2.1.6. *The presence or absence of rehabilitation and other pertinent behavioral changes*). Applicant has not met his burden of overcoming the security concerns raised by his record of drunk driving.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline G: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: Against Applicant

Subparagraph 1.c: Against Applicant

Subparagraph 1.d: For Applicant

Subparagraph 1.e: Against Applicant

Paragraph 2. Guideline J: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

DECISION

In light of all of the circumstances in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

Elizabeth M. Matchinski

Administrative Judge

1. Applicant indicates the clinician holds a master's degree in counseling and is a nationally certified addictions counselor and certified alcohol and drug abuse counselor, who specializes in the treatment and assessment of alcohol and drug-related addictions. (Ex. A) The counselor's report to the MOP indicates an affiliation with a local counseling agency and his credentials as "M. Ed./LADC." It may reasonably be inferred that he is recognized to provide counseling by the state, as evidenced by the referral of the MOP.

2. The government argued that either DC ¶E2.A7.1.2.3 or ¶E2.A7.1.2.4 is implicated based on the diagnosis of alcohol abuse by the LADC, who according to Applicant is a nationally certified addiction counselor who specializes in the assessment and treatment of alcohol and drug-related addiction. (Tr. 89)

3. Under ¶ E2.A7.1.3.4, where an individual has been diagnosed with alcohol abuse or alcohol dependence, he is required to successfully complete inpatient or outpatient rehabilitation along with aftercare requirements, participate frequently in meetings of AA or similar organization, abstain from alcohol for a period of at least 12 months, and receive a favorable prognosis by a credentialed medical professional or licensed clinical social worker who is a staff member of a recognized alcohol treatment program. While ¶ E2.A7.1.3.4 does not specifically indicate that the diagnosis must be rendered by a credentialed medical professional (¶ E2.A7.1.2.3) or a licensed clinical social worker on staff of a recognized alcohol treatment program (¶ E2.A7.1.2.4), the mitigating conditions cannot be read in isolation from the disqualifying conditions. Accordingly, ¶ E2.A7.1.3.4 is understood to apply where the diagnosis has been rendered by either a credentialed medical professional or LCSW on staff of a recognized alcohol treatment program.